



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

JUL 20 2011

Elliot S. Berke  
Partner & Co-Chair of Political Law Group  
McGuire Woods LLP  
2001 K Street, N.W., Suite 400  
Washington, DC 20006-1040

RE: MUR 6392  
Kelly for Congress and Kristen L. Smith as  
Treasurer

Dear Mr. Berke:

On October 15, 2010, the Federal Election Commission notified your clients, Kelly for Congress ("Committee") and Kristen L. Smith, as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On July 14, 2011, based upon the information contained in the complaint, and information provided by you the Commission decided to dismiss the complaint and closed its file in this matter. Accordingly, the Commission closed its file in this matter on July 14, 2011.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). A copy of the dispositive General Counsel's Report is enclosed for your information.

If you have any questions, please contact Frankie D. Hampton, the paralegal assigned to this matter, at (202) 694-1650.

Sincerely,

Christopher Hughey  
Acting General Counsel

BY: Jeff S. Jordan  
Supervisory Attorney  
Complaints Examination and  
Legal Administration

Enclosure  
General Counsel's Report

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FEDERAL ELECTION  
COMMISSION

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

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) DISMISSAL AND CASE

CELA

) CLOSURE UNDER THE

) ENFORCEMENT PRIORITY

) SYSTEM

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MUR 6392

KELLY FOR CONGRESS AND

KRISTEN L. SMITH, AS TREASURER

GENERAL COUNSEL'S REPORT

Under the Enforcement Priority System ("EPS"), the Commission uses formal scoring criteria to allocate its resources and decide which cases to pursue. These criteria include, but are not limited to, an assessment of (1) the gravity of the alleged violation, both with respect to the type of activity and the amount in violation, (2) the apparent impact the alleged violation may have had on the electoral process, (3) the legal complexity of issues raised in the case, (4) recent trends in potential violations of the Federal Election Campaign Act of 1971, as amended ("Act"), and (5) development of the law with respect to certain subject matters. It is the Commission's policy that pursuing low-rated matters, compared to other higher-rated matters on the Enforcement docket, warrants the exercise of its prosecutorial discretion to dismiss certain cases. The Office of General Counsel has scored MUR 6392 as a low-rated matter and has also determined that it should not be referred to the Alternative Dispute Resolution Office. This Office therefore recommends that the Commission exercise its prosecutorial discretion to dismiss MUR 6392.

In this matter, the complaint alleges that Kelly for Congress and Kristen L. Smith, in her official capacity as treasurer ("Committee"), violated the Act and Commission regulations by failing to include the appropriate disclaimers in certain campaign advertisements. Kelly for Congress is the authorized committee of Jesse Kelly, who was a

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1 candidate in the 2010 election for the U.S. House of Representatives for the 8th  
2 Congressional District of Arizona. Attached to the complaint is a photograph of what  
3 appears to be a campaign sign that states, "Giffords' Cut \$500 Billion from Your  
4 Medicare" and includes a disclaimer at the bottom stating "Paid for by Kelly for  
5 Congress." Because the disclaimer is not enclosed in a printed box, the complaint alleges  
6 that the Committee violated 11 C.F.R. § 110.11(c)(2)(ii).<sup>2</sup>

7 The Committee's response acknowledged that the disclaimers in some of its  
8 campaign signs were not enclosed in a printed box. However, the Committee maintains  
9 that these omissions were unintentional. According to the Committee, once it became  
10 aware of the problem, it took "immediate corrective action" by instructing volunteers to  
11 either draw a "sufficient box" around disclaimers in signs that did not comply with section  
12 110.11(c)(2)(ii) or remove such signs and replace them with ones that complied with the  
13 Commission's disclaimer requirement. Finally, the Committee includes a photograph of  
14 what it describes as an example of one of the corrected signs, in which the disclaimer is  
15 enclosed within a printed box.

16 Political committee materials that require disclaimers include, *inter alia*, campaign  
17 signs, *see* 2 U.S.C. § 441d(a) and 11 C.F.R. §§ 100.26 and 110.11(a); *see also* MUR 6329  
18 (Michael Grimm), General Counsel's Report at 2. Under 2 U.S.C. § 441d(c)(2) and

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<sup>1</sup> Representative Gabrielle Giffords was Mr. Kelly's general election opponent.

<sup>2</sup> The complaint describes the disclaimer as having been typed in "tiny print," although it does not allege that the print size constitutes a violation of the Act. Under 2 U.S.C. § 441d(c)(1) and 11 C.F.R. § 110.11(c)(2)(i), a disclaimer "must be of sufficient type size to be clearly readable by the recipient of the communication." The Commission established a safe harbor of 12-point type size for disclaimers in signs and other printed communications that are no larger than 24 inches by 36 inches. 11 C.F.R. § 110.11(c)(2)(i). While the exact dimensions of the Committee's sign are not included in the complaint or response, we have no information to suggest that it is larger than 24 inches by 36 inches. Given that the type face of the disclaimer is in what appears to be 12-point type size or a type size close to it, the disclaimer appears to be of sufficient type size to be clearly readable.

1 11 C.F.R. § 110.11(c)(2)(ii), a disclaimer for a printed communication must be contained  
2 in a printed box set apart from the other contents of the communication.

3 It appears that the campaign advertisements at issue contained sufficient identifying  
4 information to prevent the public from being misled as to who paid for them, and the  
5 violations of 2 U.S.C. § 441d(c)(2) and 11 C.F.R. § 110.11(c)(2)(ii) appear to be technical  
6 in nature. Furthermore, the Committee acknowledged that its disclaimers did not comply  
7 with the applicable statutory and regulatory requirements, and has taken remedial action to  
8 correct the deficiencies. Accordingly, under EPS, the Office of General Counsel has  
9 scored MUR 6392 as a low-rated matter and, therefore, in furtherance of the Commission's  
10 priorities, the Office of General Counsel believes that the Commission should exercise its  
11 prosecutorial discretion and dismiss this matter. *See Heckler v. Chaney*, 470 U.S. 821  
12 (1985).

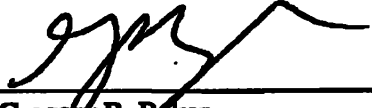
13 **RECOMMENDATIONS**

14 The Office of General Counsel recommends that the Commission dismiss  
15 MUR 6392, close the file, and approve the appropriate letters.

16  
17 Christopher Hughey  
18 Acting General Counsel  
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20  
21 02/26/11  
22 Date

23 BY:

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25 Gregory R. Baker  
26 Special Counsel  
27 Complaints Examination  
& Legal Administration

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Jeff S. Jordan  
Supervisory Attorney  
Complaints Examination  
& Legal Administration

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